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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 439-440

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

v.

ROOT REFINING COMPANY,
Defendant,

and

WILLIAM WHITMAN COMPANY, INC.,
Intervenor-Respondent.

PETITION OF UNIVERSAL OIL PRODUCTS COMPANY FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Of Counsel.

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Intervenor-Respondent.

PETITION OF UNIVERSAL OIL PRODUCTS COMPANY FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Universal Oil Products Company, prays that writs of *certiorari* issue to the United States Court of Appeals for the Third Circuit to review (a) a final judgment of said Court of Appeals entered July 6, 1948, setting aside judgments of affirmance in petitioner's favor rendered in said court in 1935; (b) certain portions of a final order of said court entered October 27, 1948, taxing costs; (c)

certain portions of an interlocutory order of said court entered June 20, 1947, and (d) an interlocutory order of said court entered April 6, 1948, all leading up to the final judgment.

Said final judgment and said orders purported to be entered in proceedings captioned in former consolidated causes in said court entitled "Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-Appellee", Nos. 5648 and 5546 (hereinafter referred to as the "*Root* case").

A determination of the Court of Appeals in earlier phases of this matter was reviewed and reversed by this Court on June 10, 1946, in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575.

A certified transcript of the record of the proceedings before the Court of Appeals since June 10, 1946 (*i.e.* proceedings since the last review by this Court) is furnished herewith in compliance with Rule 38 of this Court. Your petitioner is submitting simultaneously herewith a motion for leave of this Court to dispense with the printing of the record upon the consideration of this petition for writs of *certiorari*.* Reference is hereby made to the certified transcript for the purposes of this application with the same force and effect as if printed and filed herewith.

Jurisdictional Statement.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1). The final judgment of

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*For the convenience of the Court, the judgment and orders sought to be reviewed are printed in full and annexed hereto as an appendix.

which review is sought was entered on July 6, 1948,* and the orders, of portions** of which review is sought, were entered on June 20, 1947, April 6, 1948, and October 27, 1948, respectively.

Summary and Short Statement of Matter Involved.

As more fully appears elsewhere herein, the Court of Appeals for the Third Circuit has assumed jurisdiction and taken action purportedly in the *Root* case, heard and determined on appeal in 1935 by the said Court of Appeals (*cert. den.* 296 U. S. 626).

The history of the original litigation in the *Root* case and the steps taken in this proceeding anterior to the previous review by this Court are extensively and cogently recounted in the opinion of this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575, 576-80, as follows:

> "Petitioner, Universal Oil Products Company, is a patent-holding and licensing company. In 1929 and 1931, it brought suits for infringement against the Winkler-Koch Engineering Co.*** and the Root Refining Company, respectively. The suits were consolidated, the validity of the patents sustained,

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*By order of this Court dated September 9, 1948, the time of your petitioner to file this petition for writs of *certiorari* with respect to said final judgment was extended to and including December 1, 1948.

**Review is sought of those portions of the order entered June 20, 1947, which directed petitioner to show cause why the judgments of affirmance of the Court of Appeals, entered June 20, 1935, should not be set aside and vacated, and those portions of the order entered October 27, 1948, which directed the taxation of costs against petitioner. The entire order of April 6, 1948, is sought to be reviewed.

***This defendant was never served and does not appear anywhere in the litigation.

and decrees for their infringement entered. 6 F. Supp. 763. The Circuit Court of Appeals for the Third Circuit, in an opinion by Judge J. Warren Davis, affirmed the decrees, 78 F. 2d 991, and this Court, in October, 1935, denied *certiorari*. *Root Refining Co.* v. *Universal Oil Products Co.*, 296 U. S. 626. Both before and after the decision in the *Root* case, Universal started similar infringement suits against other oil companies. Universal invoked the Root decisions as *res judicata* against some of these companies. It maintained that, although these companies had not been parties of record in the *Root* suit, they were members of a 'patent club,' to which Root belonged and which had been formed to pool money for the defense of any member of the 'club' in an infringement suit against it, and that the *Root* case had been defended by the attorneys for the 'patent club.' Universal contended that these circumstances made the other oil companies substantial parties to the Root litigation and as such bound by its outcome.

"On June 2, 1941, during the pendency of these latter cases, attorneys who had represented Root and were representing the other oil companies advised the attorneys of the petitioner that on June 5, 1941, they would bring to the attention of the judges of the Third Circuit Court of Appeals the circumstances surrounding the appeal in the *Root* case, and, more particularly, the relations of one Morgan S. Kaufman to the outcome of that appeal, and invited petitioner's attorneys to attend. At the hearing on June 5, the moving attorneys suggested, in substance, that testimony taken at the trial

of Judge Davis pointed to bribery of Judge Davis by Kaufman to secure a decision favorable to Universal in the *Root* appeal. They urged an investigation of the questionable features surrounding affirmance of the *Root* decree, but expressed doubt as to the capacity in which they could formally make such a request of the Court. Their difficulty was due to the fact that after this Court had denied *certiorari* in the *Root* case, Root had settled its controversy with Universal and was unwilling to disturb the agreement by an attempt to reopen the law suit.* The other oil companies who were in litigation with Root insisted that they were neither formal nor substantial parties to the *Root* case. And so their attorneys, who were the attorneys in the *Root* litigation and the moving attorneys in the present proceedings, could not move on their behalf to have the *Root* decree vacated. But these other oil companies had an interest in the *Root* decree since it might be used in pending cases to their disadvantage. Universal offered to consent to a reargument of the *Root* case and to preserve to the Root Company the benefits of the existing agreement, even if Universal should prevail upon reargument. Throughout these proceedings Universal stood ready to carry out this offer, but nothing ever came of it, presumably because Root was not represented at these hearings and the other oil companies were not parties of record in the original litigation.

"The dilemma of the attorneys who initiated these proceedings to set aside a fraudulent judgment

*This settlement was effectuated as of April 1, 1939.

but could not speak for any client prepared to come before the court as a party in interest, was resolved by a suggestion from the presiding judge of the Circuit Court of Appeals. The suggestion was that the court would accept the services of these attorneys as *amici curiae*. Accordingly, they offered themselves in that role. Upon their acceptance as such by the court they asked for the appointment of a master to investigate the *Root* appeal. While they thus proceeded as *amici* they stated quite candidly that they were also concerned with the interests of their clients, the oil companies in pending litigation. As a matter of law, however, their status was only that of *amici*, for their clients did not subject themselves to the court's jurisdiction. The relation of these lawyers to the court, after it recognized them as *amici*, remained throughout only that of *amici*.

"A master was appointed and he conducted an extensive investigation. He examined records in the possession of the United States Attorney for the Southern District of New York, the records of proceedings before a Philadelphia grand jury, bank records, and various statements of interested parties. From this mass of material, he selected those documents which he deemed appropriate for submission to the inspection of the *amici* and of counsel for Universal. Witnesses were also heard and petitioner was given the right to cross-examine. But the investigation was not governed by the customary rules of trial procedure. Petitioner's counsel duly excepted to the manner in which the investigation was being conducted, 'if it were to involve any property rights of our clients, including the validity of any

judgment. . . .' The master evidently did not view the proceedings in the light of an adversary litigation. He ruled 'that the investigation—for that is all it is—should [not] be conducted strictly according to the rules of evidence in litigation.' At the conclusion of this investigation, the master rendered a report in which he concluded 'that there was in connection with this case such fraud as tainted and invalidated the judgments' in the *Root* appeal.

"On the basis of this conclusion, the Court of Appeals on June 15, 1944, entered an order directing that the judgments be vacated and the cause be reargued. The relief thus granted was that to which petitioner had consented before the investigation got under way. On July 24, 1944, the *amici* applied to the court below for an order directing that the expenses and compensation of the master be taxed against Universal. In view of the fact that Universal appeared and participated in the investigation before the master, with acquiescing knowledge that the master's fees and expenses would be assessed by the court, we do not disturb the taxation of the master's fees and expenses. The *amici* also asked the Court to assess against Universal their expenses and reasonable attorneys' fees. The court awarded $54,606.57 in expenses, part of which was for the amount they had advanced in payment to the master, and $100,000 as compensation for their services. These amounts had in fact already been paid to the attorneys by their oil company clients. The awards thus constituted an order for reimbursement of the clients by Universal. The case was heard by the court *en banc*, and two of the judges thought that

> the *amici* were only entitled to a compensation of $25,000. 147 F. 2d 259. Questions of importance in judicial administration were obviously involved by the disposition below, and so we brought the case here. 324 U. S. 839."

The order of the Court of Appeals awarding compensation and expenses, referred to in the quotation above, was reversed by this Court (328 U. S. 575).

Subsequent to the decision of this Court, the Court of Appeals (June 20, 1946), through its clerk, invited suggestions from your petitioner and *amici curiae,* therein referred to, as to "the present status of the appeals" in the *Root* case "now that the petitions for writs of certiorari have been disposed of by the Supreme Court." Both petitioner and said *amici curiae* submitted letters to the clerk setting forth their respective interpretations of the decision of this Court.

Before the Court of Appeals held a further hearing in the matter, Skelly Oil Company* filed a petition in that court (October 1946) for leave to intervene and participate in any further proceedings in the Court of Appeals or the

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*Skelly Oil Company was the defendant in an action commenced by your petitioner's predecessor over twenty years ago for infringement of certain letters patent not involved in the *Root* case. Judgment in favor of your petitioner was affirmed upon appeal. Since about 1927 an accounting had been going on in that case. After the Court of Appeals had set aside the judgments of affirmance in the *Root* case (June 15, 1944), Skelly sought to interpose in its litigation with petitioner's predecessor a supplemental defense of unclean hands, claiming a vitiation of plaintiff's recovery therein, all in spite of the fact that no claim had ever been advanced by Skelly or anyone else that the judgments of the District Court or of the Court of Appeals in that case were other than impeccable and unimpeachable.

District Court. None of the allegations in a proposed so-called "Pleading" annexed to Skelly's petition for intervention was directed toward any issues in the *Root* case.

A hearing before the Court of Appeals took place on December 19, 1946, to consider further proceedings in the light of the decision of this Court in 328 U. S. 575. At that hearing petitioner moved the court, upon all of the proceedings theretofore had and upon the settlement agreements between it and Root, for an order vacating the orders of the Court of Appeals (June 15, 1944) setting aside the judgments of affirmance in the *Root* case, but agreed that the *Root* case be dismissed by the District Court as moot.* Petitioner also opposed the intervention of Skelly Oil Company. *Amici curiae* urged that the orders, setting aside the judgments of affirmance for fraud, should not be disturbed.

On June 20, 1947, the Court of Appeals entered orders with respect to the matters submitted at the December 19, 1946, hearing. These orders:

(a) *vacated its orders of June 15, 1944* (which had set aside the judgments of affirmance in the *Root* case);

(b) directed your petitioner to show cause, if any there might be, before the Court of Appeals on October 13, 1947, why the judgments of affirmance in the *Root* case should not be set aside and vacated "by reason of

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*Besides the settlement referred to in the opinion of this Court (p. 5, *supra*) entered into in 1939, petitioner and Root entered into a further general settlement in July 1944 providing, *inter alia,* for a dismissal of the *Root* case. Furthermore in May 1944 this Court, in *Universal Oil Co.* v. *Globe Co.,* 322 U. S. 471, had held one of the patents involved in the *Root* case invalid and the other not infringed by the same process accused in the *Root* case. The patent not invalidated in the *Globe* case expired in 1938. For all these reasons petitioner urged upon the Court of Appeals that the *Root* case was wholly moot.

alleged fraud and corruption practiced upon this court by Universal Oil Products Company or those acting on its behalf";

(c) directed that Skelly Oil Company (which had never been a party to the *Root* case or interested in any of the original issues thereof) be permitted to intervene as prayed, *i.e.*, "to participate in any further proceedings in this Court [Court of Appeals] or in the district court on the question whether there should be a dismissal for fraud"; and

(d) authorized the Attorney General or some member of his staff designated by him to appear as *amicus curiae*.

Shortly after these orders were entered, *amici curiae*, who had originated the proceedings in 1941, formally withdrew from the proceeding, with the approval of the Court of Appeals (July 30, 1947).

At about the same time, three representatives of the Department of Justice filed their appearances in this proceeding on behalf of the United States, "as *amicus curiae*".

The hearing on the order to show cause originally returnable October 13, 1947, was adjourned from time to time and did not take place, even on preliminary aspects, until January 22, 1948.

On January 16, 1948, the Chief Justice of the United States designated the Honorable Morris A. Soper, the Honorable John C. Mahoney and the Honorable E. Barrett Prettyman to sit as the Court of Appeals for the Third Circuit in further proceedings in this matter and in one other matter.

In the spring of 1948, Skelly Oil Company paid $225,000 to petitioner's predecessor in settlement of its said patent

litigation pending in Delaware and, with leave of the Court of Appeals, withdrew as intervenor in these proceedings.

In the meantime (December 30, 1947) William Whitman Company, Inc., the present intervenor-respondent, petitioned the Court of Appeals for leave to intervene in these proceedings.* Over the opposition of your petitioner, the intervention was permitted by order of the Court of Appeals entered April 6, 1948.

In the same order, the Court of Appeals *sua sponte* "formulated" certain charges made against your petitioner. The charges were not formulated as a result of any formal pleadings filed by any "parties" before the court or in any justiciable case or controversy within the meaning of the federal Constitution, but were drawn up by the Court of Appeals as a result "of the report of the special master [in the earlier investigation condemned by this Court in 328 U. S. 575] and the allegations of wrong-doing set forth by the United States as amicus curiae and by the William Whitman Company." The order provided in part as follows:

> "* * * and to that end sets forth the charges that have been made and are to be tried as follows:
>
> "(a) Whether Judge J. Warren Davis' action in these cases was influenced by the expectation of gain or favors pursuant to an agreement or understanding to that effect with Morgan S. Kaufman.

*The Whitman Company, on December 28, 1946, had commenced litigation against your petitioner in the District Court of the United States for the District of Delaware in which it was claimed that Whitman had been induced to enter into a license agreement with petitioner upon the representation that the judgments of affirmance in the *Root* case rendered in 1935 were valid.

"(b) Whether certain transactions effected in the latter part of 1935, whereby Morgan S. Kaufman advanced the sum of $10,000 to one Charles Stokley, a cousin of Judge Davis, were the means whereby Judge Davis was compensated in whole or in part for his decision favorable to Universal Oil Products Company in these cases, and whether certain other transactions between Judge Davis and Morgan S. Kaufman during the period 1935 to 1938 allegedly related to the litigation evolving from the bankruptcy of one William Fox, were part of a corrupt and illicit combination between Judge Davis and Kaufman to obstruct justice.

"(c) Whether Morgan S. Kaufman was employed or retained by Universal Oil Products Company in connection with these cases and, if so, whether the purpose of such employment or retainer was the expectation of Universal Oil Products Company that Kaufman would exercise or endeavor to exercise an improper influence upon Judge Davis in order to secure favorable judicial action by him in connection with these cases."

The Court of Appeals for the first time directed that the trial of the charges

"be consolidated with the trial of the charges set forth in the order of this court passed this day in Case No. 6459, American Safety Table Company v. Singer Sewing Machine Company,* to the follow-

*That case was a patent infringement suit brought in the Eastern District of Pennsylvania resulting in a decree in favor of the defendant and dismissing the plaintiff's complaint. Upon

ing extent, that is to say, the evidence in Cases Nos. 5648 and 5546, Root Refining Company v. Universal Oil Products Company shall first be taken and the privilege shall be accorded to Counsel for the respective parties in Number 6459 to cross examine the witnesses if they so desire, and that said testimony, when completed, shall be stipulated and accepted by counsel in Number 6459 as testimony to be considered in that case, and thereafter additional testimony may be taken in Number 6459, if counsel for either party or counsel for the United States, amicus curiae, so desire."

In no other respect was the proceeding at bar "consolidated" with the American Safety Table Company case.

Hearings commenced on May 10, 1948, and testimony was taken, by and in the presence of the Court of Appeals, from day to day for ten consecutive court days. The facts were bitterly disputed; petitioner protested, and still protests, its innocence; no direct or circumstancial evidence,

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appeal, the decision of the District Court was reversed by the Court of Appeals for the Third Circuit, 95 F. 2d 543; *cert. den.* 305 U. S. 622. In September, 1944 (after the Court of Appeals had set aside its judgments of affirmance in the *Root* case), the defendant made an application to the Court of Appeals for a recall of its mandate and for a reargument of the case upon the merits based upon the alleged disqualification of certain judges who heard the appeal. Arguments upon the issues raised by that application were heard by the Court of Appeals on March 6, 1945, but decision was withheld pending a decision by this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575. On June 20, 1947, the Court of Appeals entered an order in that case directing American Safety Table Company to show cause why the relief prayed for by Singer should not be granted and authorized the Attorney General of the United States or his representative to appear *amicus curiae*.

we shall argue, sustained the charges of corruption. No written briefs were permitted by the Court of Appeals, but elaborate oral arguments were made on May 31 and June 1, 1948.

Root Refining Company, the only party to the *Root* case except petitioner, was not sought to be subjected to the process of the court and, as had been the fact since the commencement of the investigation in 1941, Root failed and refused to appear or participate. Those before the court were, exclusively, (a) the United States, *Amicus Curiae*, which the court ruled *not* to be a "part of the case", (b) the Whitman Company, a stranger to the *Root* case, which was permitted to intervene, not with respect to any issue in the *Root* case but solely with respect to whether the judgments of affirmance in the *Root* case in 1935 had been obtained by fraud, and (c) your petitioner. Not one word, whether of testimony or of argument, dealt with any issue in the *Root* case.

Under these circumstances, petitioner argued (besides a vigorous defense on the merits) *not* that the court lacked power to conduct an investigation of its own integrity, but that no judgment could be entered in such an anomalous proceeding which might deprive petitioner of its property, particularly *vis-a-vis* others in actual or potential litigation with petitioner, including especially the Whitman Company. Petitioner urged that, in any event, it was entitled to a trial by jury.

Not only were the "parties" before the court exclusively as just described, but petitioner argued there were no pleadings or justiciable issues before the court in a case or controversy under the federal Constitution.

Nevertheless, the Court of Appeals overruled all such objections and conducted twelve hearings, including argu-

ments, in three weeks during which three-quarters of a million words were taken and over 300 exhibits received. Five weeks later (July 6, 1948) the Court of Appeals filed an opinion (169 F. 2d 514) and a "Summary of the evidence and findings of fact prepared by the court", and entered a final judgment which directed that the mandates of the Court of Appeals issued in the *Root* case on October 30, 1935, be recalled, that the judgments of the Court of Appeals affirming the decrees of the District Court therein be vacated, and that the cases be remanded to the District Court with directions to vacate its judgment therein and dismiss the bills of complaint. The judgment also provided that costs, including those in American Safety Table Company versus Singer Sewing Machine Company,

> "be paid, *four-fifths* by Universal Oil Products Company and one-fifth by the American Safety Table Company."

Thereafter, United States of America, *Amicus Curiae,* and Singer Sewing Machine Company made applications to the Court of Appeals for the allowance of counsel fees, costs and expenses.

The Whitman Company, the intervenor-respondent, made application for costs, not including counsel fees, although, in its petition for intervention, and in its averments and petition for relief, it had asked for the allowance of counsel fees.

On October 27, 1948, the court denied with prejudice the right of all counsel, including counsel for Whitman, to counsel fees and expenses, but directed the clerk of the Court of Appeals to tax costs, partly in conformity with the rules of that court and partly in conformity with rules

applicable to the District Court. Those costs incurred in both cases were ordered by the court to be taxed, *four-fifths against your petitioner and one-fifth against the American Safety Table Company.*

Incredible as it may seem, all of these proceedings took place and the judgment and the orders were originally entered, not in a District Court or other court of original jurisdiction, but in the United States Court of Appeals for the Third Circuit, a court granted by the statutes, which created and maintain it, specifically and exclusively appellate jurisdiction.

Questions Presented.

1. Did the Court of Appeals err in that:

(a) it usurped the function of a court of original jurisdiction with respect to disputed questions of fact;

(b) as a court of exclusively appellate jurisdiction, it permitted the institution before it of what purported to be an original suit, received evidence and adjudicated disputed questions of fact therein and made original rulings of law with respect to the reception of evidence and its effect;

(c) it permitted the intervention of a stranger in a proceeding which was not, and did not thereby become, a case or controversy;

(d) it *sua sponte* required petitioner to show cause why it should not lose its property and property rights in an anomalous proceeding wherein there were no parties, pleadings or justiciable controversies;

(e) it "formulated" charges against your petitioner based in part at least upon a previous record heretofore condemned by this Court in 328 U. S. 575;

(f) it reached many untenable ultimate conclusions of fact, *e.g.*:

i. that Judge Davis' action in the *Root* case was improperly influenced by one Morgan S. Kaufman, one of petitioner's counsel;

ii. that Kaufman was employed by petitioner for the purpose of exercising and with the expectation that he would exercise an improper influence over Judge Davis in order to secure favorable judicial action in the *Root* case;

iii. that a loan by Kaufman to Davis' cousin, Stokley, adequately secured by Florida real estate, was the means by which Davis was compensated at least in part for his decision in the *Root* case favorable to your petitioner;

iv. that there was an illicit conspiracy between Davis and Kaufman to obstruct justice in existence as early as the date of the rendition of the judgments of affirmance in the *Root* case in 1935;

(g) it reached the conclusions described in (f) i, ii, iii and iv hereof in a fraud case upon evidence which was not clear, unequivocal or convincing;

(h) it misapplied the law, or failed to make rulings, upon the following propositions:

i. is evidence given by a witness before a grand jury or at a criminal trial and used unsuccessfully to

refresh his recollection, admissible as proof of the facts testified to before the grand jury or at the criminal trial or can it be used only for the purpose of impeaching the witness;

ii. is the doing of a favor by a lawyer for a judge and at the judge's request, where the lawyer is practicing before such judge, misconduct on the part of either or both;

iii. does the doing of such a favor, especially where it constitutes a legitimate business transaction, amount to such misconduct as to invalidate a judgment rendered by the judge in favor of the lawyer's client shortly before the doing of the favor;

iv. particularly, is this so where the agreement to do the favor and the favor itself took place after the decision of the court;

v. is there any impropriety in a general retainer of a lawyer, of any amount which the client is willing to pay, to preclude the lawyer from accepting other employment;

vi. is the practice of retaining an attorney who has the confidence of local courts so improper as to invalidate any judgment rendered by such courts in cases in which such an attorney represents a litigant;

vii. may a finding of fraud or bribery be made in the absence of clear, unequivocal and convincing evidence thereof;

viii. is not the burden of establishing such fraud or bribery by clear, unequivocal and convincing proof upon those who assert the same;

ix. may an inference of culpability be drawn unless it is the only fair and reasonable hypothesis inferable from the circumstances proved;

x. where two reasonable hypotheses are inferable from the circumstances proved, one of innocence and one of culpability, should not the court as a matter of law draw the inference of innocence;

xi. may the court draw any inference which is at variance with any direct credible testimony to the contrary;

xii. even if a continuing conspiracy exist between a judge and a lawyer to obstruct justice, may the lawyer's client, in the absence of clear, unequivocal and convincing proof that it knowingly hired the lawyer for the purpose of influencing the court or otherwise knowingly participated in such conspiracy, be charged with the stigma of fraud or wrongdoing;

xiii. was there before the Court of Appeals a case or controversy; if so, who was the plaintiff, what was the complaint, and what were the issues;

(i) it denied your petitioner a trial by jury;

(j) it directed that four-fifths of the costs incurred in another proceeding into which, for the convenience of the court, the record in the case at bar was stipulated, be taxed against your petitioner?

2. Did the Court of Appeals err in entering its judgment dated July 6, 1948?

3. Did the Court of Appeals err in entering those portions of the orders of June 20, 1947, of which review is hereby sought?

4. Did the Court of Appeals err in entering the order of April 6, 1948?

5. Did the Court of Appeals err in entering those portions of its order of October 27, 1948, of which review is hereby sought?

6. Did the proceeding here sought to be reviewed constitute a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States so as to permit the Court of Appeals to enter the judgment and orders here sought to be reviewed or take any action of any nature whatsoever therein binding upon petitioner or affecting its property rights or judgments?

7. Did the United States, *Amicus Curiae,* participating in this proceeding as a friend of the court, constitute a party adverse to petitioner within the meaning of Article III, Section 2, of the Constitution of the United States?

8. Did the intervenor, Whitman, constitute a party adverse to petitioner within the meaning of Article III, Section 2, of the Constitution of the United States?

9. Did the Court of Appeals have jurisdiction to enter in this proceeding the judgment of July 6, 1948, or the orders of June 20, 1947, April 6, 1948, or October 27, 1948, which are here sought to be reviewed, or take any action of any nature binding upon petitioner as a result, or as a part, or in pursuance, of an investigation in a cause which had been rendered moot by reason, *inter alia,* of the settlement thereof by the parties thereto, particularly since the

former and only actual adverse party in said cause failed and refused to appear or participate, but, on the contrary, signified to that court its desire that the finality of the settlement of the cause be undisturbed?

10. Do the judgment of July 6, 1948, or those portions of the orders of the Court of Appeals dated June 20, 1947, and April 6, 1948, and October 27, 1948, here sought to be reviewed, deprive your petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States?

11. Do the judgment or orders, or the portions thereof here sought to be reviewed, deviate from the mandate of this Court in the above-entitled causes issued under date of July 11, 1946?

12. Did the Court of Appeals err as a matter of constitutional, as well as statutory and common, law in granting the application of William Whitman Company, Inc. for leave to intervene?

Reasons Relied on for the Allowance of These Writs.

Exercise of the power of this Court to grant the writs of *certiorari* herein prayed for is sought upon the following grounds:

1. This Court, as a matter of equity and good conscience, should exercise its discretion to issue its writ of *certiorari* to review upon the facts and the law the action of the Court of Appeals in determining *in the first instance* a claim that the judgments of the Court of Appeals in *Root Refining Co.* v. *Universal Oil Products Co.*, 78 F. 2d 991, were invalid by reason of fraud or corruption because, in

the absence of exercise of such discretion, your petitioner will be denied any review of the jurisdiction and power of the Court of Appeals and of the findings of fact and conclusions of law made by a court which not only formulated the charges against your petitioner but heard the same as a trier of the facts.

2. The Court of Appeals, in assuming jurisdiction to enter its judgment of July 6, 1948, and those portions of the orders here sought to be reviewed, did so in a matter which did not constitute a case or controversy, and in so doing acted in a manner which is untenable and probably in conflict with the decisions of this Court and of other Courts of Appeals.

3. The Court of Appeals, in assuming jurisdiction to enter its judgment of July 6, 1948, and those portions of the orders here sought to be reviewed, did so in a matter in which there were no adverse parties, asserting adverse legally cognizable interests, and in so doing acted in a manner which is untenable and probably in conflict with the applicable decisions of this Court and of other Courts of Appeals.

4. The Court of Appeals, in assuming jurisdiction to enter its judgment of July 6, 1948, and those portions of the orders here sought to be reviewed, did so in cases which had become entirely moot, for (a) these cases had been completely settled by agreement of the parties and (b) their subject matter had ceased to exist as one of the two patents involved had expired and the other had been held invalid by this Court, and in so doing acted in a manner which is untenable and probably in conflict with the

applicable decisions of this Court and of other Courts of Appeals.

5. The Court of Appeals, in making those portions of the orders sought to be reviewed, and in entering the judgment of July 6, 1948, deprived petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States, and in so doing acted in a manner which is probably in conflict with the applicable decisions of this Court and of other Courts of Appeals.

6. The question of whether the Court of Appeals had jurisdiction to enter its judgment of July 6, 1948, and those portions of the orders here sought to be reviewed in these proceedings involves important questions of federal judicial administration which should be resolved by this Court.

7. The action of the Court of Appeals, in entering its judgment of July 6, 1948, and those portions of the orders here sought to be reviewed, is believed to constitute a deviation by that court from the mandate of this Court, issued under date of July 11, 1946, and such deviation is untenable.

8. The action of the Court of Appeals, in making that portion of the order which granted leave to the intervenor-respondent to intervene, is, as a matter of constitutional, as well as statutory and common, law untenable and in conflict with the applicable decisions of other Courts of Appeals.

9. The findings of fact and conclusions of law made by the Court of Appeals, which furnished the basis for the entry of its judgment of July 6, 1948, were unwarranted

and untenable, as a matter of constitutional, as well as statutory and common, law.

WHEREFORE, your petitioner respectfully prays that writs of *certiorari* be issued out of and under the seal of this Court, directed to the Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all of the proceedings in the investigation conducted in the consolidated cause numbered and entitled in its Docket Nos. 5648 and 5546, Root Refining Company, Defendant-Appellant, v. Universal Oil Products Company, Plaintiff-Appellee, since June 10, 1946 (the date of the last review of these proceedings by this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575), and that the judgment and those portions of the orders of the Court of Appeals for the Third Circuit, of which review is hereby sought, may be reversed by this Court and that your petitioner have such other and further relief in the premises as to this Court may seem just; and your petitioner will ever pray.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

BY: RALPH S. HARRIS,
Attorney for Petitioner.

JOHN R. MCCULLOUGH,
ADAM M. BYRD,
LEO L. LASKOFF,
H. ALLEN LOCHNER,
Of Counsel.

November 30, 1948.

IN THE

Supreme Court of the United States

October Term, 1948

No.

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

v.

ROOT REFINING COMPANY,
Defendant,

and

WILLIAM WHITMAN COMPANY, INC.,
Intervenor-Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

Judgment and Orders Below

The final judgment of the Court of Appeals for the Third Circuit entered July 6, 1948, the final order of that court entered October 27, 1948, and the interlocutory orders of that court entered June 20, 1947, and April 6, 1948, respectively, are set forth in the certified transcript of the record filed with the Clerk of this Court and in the appendix annexed hereto.

The opinion of the Court of Appeals is set forth in 169 F. 2d 514.

Jurisdiction

The facts supporting the jurisdiction of this Court are set forth, or incorporated by reference, in the petition.

Cases believed to sustain the jurisdiction of this Court are as follows:

Universal Oil Co. v. *Root Rfg. Co.*, 328 U. S. 575;
Trade Comm'n v. *Goodyear Co.*, 304 U. S. 257;
Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227;
Willing v. *Chicago Auditorium*, 277 U. S. 274;
U. S. v. *California Canneries*, 279 U. S. 553.

Statement of Facts

The facts are sufficiently set forth, or incorporated by reference, in the petition.

Specification of Errors

If the writs are granted, petitioner will urge that the Court of Appeals, in the instant proceeding, erred in the following respects:

1. In that:

(a) it usurped the function of a court of original jurisdiction with respect to disputed questions of fact;

(b) as a court of exclusively appellate jurisdiction, it permitted the institution before it of what purported to be an original suit, received evidence and adjudicated disputed questions of fact therein and made original

rulings of law with respect to the reception of evidence and its effect;

(c) it permitted the intervention of a stranger in a proceeding which was not, and did not thereby become, a case or controversy;

(d) it *sua sponte* required petitioner to show cause why it should not lose its property and property rights in an anomalous proceeding wherein there were no parties, pleadings or justiciable controversies;

(e) it "formulated" charges against your petitioner based in part at least upon a previous record heretofore condemned by this Court in 328 U. S. 575;

(f) it reached many untenable ultimate conclusions of fact, *e. g.*:

i. that Judge Davis' action in the *Root* case was improperly influenced by Kaufman;

ii. that Kaufman was employed by petitioner for the purpose of exercising and with the expectation that he would exercise an improper influence over Judge Davis in order to secure favorable judicial action in the *Root* case;

iii. that the loan by Kaufman to Davis' cousin, Stokley, was the means by which Davis was compensated at least in part for his decision in the *Root* case favorable to your petitioner;

iv. that there was an illicit conspiracy between Davis and Kaufman to obstruct justice in existence as early as the date of the rendition of the judgments of affirmance in the *Root* case in 1935;

(g) it reached the conclusions described in (f) i, ii, iii, and iv hereof in a fraud case upon evidence which was not clear, unequivocal or convincing;

(h) it misapplied the law, or failed to make rulings, upon the following propositions:

i. is evidence given by a witness before a grand jury or at a criminal trial and used unsuccessfully to refresh his recollection, admissible as proof of the facts testified to before the grand jury or at the criminal trial or can it be used only for the purpose of impeaching the witness;

ii. is the doing of a favor by a lawyer for a judge and at the judge's request, where the lawyer is practicing before such judge, misconduct on the part of either or both;

iii. does the doing of such a favor, especially where it constituted a legitimate business transaction, amount to such misconduct as to invalidate a judgment rendered by the judge in favor of the lawyer's client shortly before the doing of the favor;

iv. particularly, is this so where the agreement to do the favor and the favor itself took place after the decision of the court;

v. is there any impropriety in a general retainer of a lawyer, of any amount which the client is willing to pay, to preclude the lawyer from accepting other employment;

vi. is the practice of retaining an attorney who has the confidence of local courts so improper as to invalidate any judgment rendered by such courts

in cases in which such an attorney represents a litigant;

vii. may a finding of fraud or bribery be made in the absence of clear, unequivocal and convincing evidence thereof;

viii. is not the burden of establishing such fraud or bribery by clear, unequivocal and convincing proof upon those who assert the same;

ix. may an inference of culpability be drawn unless it is the only fair and reasonable hypothesis inferable from the circumstances proved;

x. where two reasonable hypotheses are inferable from the circumstances proved, one of innocence and one of culpability, should not the court as a matter of law draw the inference of innocence;

xi. may the court draw any inference which is at variance with any direct credible testimony to the contrary;

xii. even if a continuing conspiracy existed between a judge and a lawyer to obstruct justice, may the lawyer's client, in the absence of clear, unequivocal and convincing proof that it knowingly hired the lawyer for the purpose of influencing the court or otherwise knowingly participated in such conspiracy, be charged with the stigma of fraud or wrongdoing;

xiii. was there before the Court of Appeals a case or controversy; if so, who was the plaintiff, what was the complaint, and what were the issues?

(i) it denied your petitioner a trial by jury;

(j) it directed that four-fifths of the costs incurred in another proceeding into which, for the convenience of the court, the record in the case at bar was stipulated, be taxed against your petitioner.

2. In entering its judgment dated July 6, 1948.

3. In entering those portions of its orders dated June 20, 1947, of which review is hereby sought.

4. In entering its order of April 6, 1948.

5. In entering those portions of its order of October 27, 1948, of which review is hereby sought.

6. In assuming jurisdiction to make and enter herein its judgment dated July 6, 1948, and its orders of June 20, 1947, April 6, 1948, and October 27, 1948, respectively, in a matter which did not constitute a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States.

7. In assuming jurisdiction to make and enter herein its judgment dated July 6, 1948, and its orders of June 20, 1947, April 6, 1948, and October 27, 1948, respectively, although the causes in which the said judgments and orders were captioned had become entirely moot for (a) they had been completely settled by agreement of the parties thereto, making provision for the vacation of the judgments heretofore rendered therein and for a dismissal of the bills; and (b) their subject matter had ceased to exist as one of the

two patents involved had expired and the other had been held invalid by this Court.

8. In assuming that intervenor Whitman, even granting the propriety of the intervention, constituted an adverse party within the meaning of Article III, Section 2, of the Constitution of the United States.

9. In treating United States of America, *Amicus Curiae,* as the plaintiff in the proceeding, and hence a party within the meaning of the Constitution, although the court correctly held it not to be a "part of the case".

10. In making and entering the judgment and orders herein referred to in that the entry thereof deprived petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

11. In making and entering that portion of the order of April 6, 1948, which granted leave to the Whitman Company to intervene for the first time in an appellate court and to have the status, in effect, of a plaintiff in the proceeding although there was no case or controversy then pending before that court and Whitman did not present an issue of law or fact in common with any of those in the *Root* case.

12. In deviating from the mandate of this Court dated July 11, 1946.

Point I.

THE PETITION FOR WRITS OF *CERTIORARI* SHOULD BE GRANTED, AS A MATTER OF EQUITY AND GOOD CONSCIENCE, TO REVIEW ON THE MERITS THE FINDINGS, CONCLUSIONS AND JUDGMENT OF THE COURT OF APPEALS, SITTING AS A COURT OF FIRST INSTANCE AND ADJUDICATING DISPUTED QUESTIONS OF FACT.

We do not maintain that petitioner is entitled as a matter of right to a review on the merits of the findings, conclusions and judgment of the Court of Appeals. We concede that appeals and reviews are a matter of grace.

The situation here, however, is extraordinary. Purporting to adjudicate issues of fact and law as between "parties" who first appeared before it, the Court of Appeals has formulated issues as between those parties, all completely alien to any of the issues between the parties to the *Root* case, and has entered a final judgment affecting the property and rights of petitioner as between itself and strangers to the original litigation.

The issues adjudicated by the Court of Appeals did not arise in a justiciable case or controversy instituted in a court of original jurisdiction, were not tried before a judge of such a court, with or without a jury, and the determination of the lower court has not been reviewed. Unless this Court, as a matter of equity and good conscience, shall by the issuance of the writs prayed review the adjudication of the Court of Appeals, petitioner will be deprived of what many writers, both judicial and professorial, believe to be inherently just under American judicature.

For example, Dean Pound wrote in *Appellate Procedure in Civil Cases* (1941) (p. 3):

> "Ulpian tells us that appeals are needful because they correct the unfairness or unskilfulness of those

who adjudicate. But review does more than correct unfairness and mistakes. That determinations may be reviewed is a preventive of unfairness and a stimulus not to make mistakes. The possibility of review by an independent tribunal, especially by a bench of judges as distinguished from a single administrative official, is not the least of the checks which the law imposes upon its tribunals of first instance. That hasty, unfair or erroneous action may be reversed by a court of review holds back the impulsive, impels caution, constrains fairness and moves tribunals to keep to the best of their ability in the straight path."

In *Yates* v. *The People,* 6 Johns, *337, the Court for the Trial of Impeachments and the Correction of Errors of New York, speaking through Senator Clinton, observed (p. *364):

> "Our law considers it an essential right of a suitor to have his cause examined in tribunals superior to those in which he considers himself aggrieved."

In *Handy* v. *Butler,* 183 App. Div. 359, 169 N. Y. Supp. 770, the New York Appellate Division stated (p. 360):

> "The right of an appeal has been recognized uniformly by the Legislature as 'Our law considers it an essential right of a suitor to have his cause examined in tribunals superior to those in which he considers himself aggrieved.' (*Yates* v. *People,* 6 Johns. 364)."

The Court of Appeals for the District of Columbia stated (*Boykin* v. *Huff,* 121 F. 2d 865, 872):

> "The right of appeal, though statutory, is not insubstantial, and its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily."

In *Stuart* v. *The People,* 4 Ill. (3 Scam.) 395, the Supreme Court of Illinois said (p. 403):

> "Perilous, indeed, would be the condition of the citizen, if he had not the privilege, in such a case, to have it reviewed by another tribunal, and defective would be our jurisprudence, if it afforded no means of relief."

Historically, the failure of a judicial system to allow one appeal to the losing party has almost invariably evoked a protest. Thus, the lack in many instances of an appeal from the Circuit Courts of the United States during the nineteenth century engendered criticism which is colorfully described by the authors of *The Business of the Supreme Court* (Frankfurter and Landis, 1927) as follows (p. 87-8):

> "The circuit courts exercised partly an appellate jurisdiction. Frequently, therefore, the district judge sitting in the circuit court would sit in sole judgment upon himself as judge of the district court. As we are told in an influential contemporary paper before the American Bar Association:
>
> " 'Such an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip intoxicated with the vanity of a matured opinion and doubtless also a published decision.'

"We have suffered in this country from the folly of multiplicity of appeals, but the federal judicial system, at this time, too often erred in the opposite direction, for the decisions of the circuit court were final in all cases involving less than $5,000. Therefore, in cases arising in the district court appeals in numerous instances were empty form; in cases begun in the circuit court, unless the amount exceeded $5,000, there was no opportunity of appeal even to 'Philip intoxicated.' The hazards of litigation were amplified by the conscious reduction of the *ad damnum* below the appealable requirement. No wonder that extravagant language, descriptive of tyranny, was employed by responsible lawyers to characterize the powers wielded at this time by a single federal judge!"

Again, the same authors, in discussing the public reaction to the lack of an appeal from the Circuit Courts in criminal cases, said (*id.*, p. 109):

"For a full hundred years there was no right of appeal to the Supreme Court in criminal cases. Until 1889 even issues of life or death could reach that Court only upon a certificate of division of opinion. As the practice became more prevalent for a single judge to hold circuit court (until in the eighties it became the rule rather than the exception), the finality of power of the single judge became particularly open to criticism in criminal cases. The growing feeling of injustice finally ripened into the Act of February 6, 1889, by which, in all cases of conviction for a capital crime, final judgment against

the accused might be reviewed by the Supreme Court."

The federal judicial system as now constituted (Title 28 U. S. C. § 1252, 1253, 1291; Title 18 U. S. C. § 3731) recognizes one appeal as of right almost without exception.

We respectfully submit, therefore, that assuming that the Court of Appeals had the power (though we shall argue that it lacked the power) to entertain, in the first instance, proceedings between new parties with respect to new issues and to adjudicate therein disputed questions of fact, nevertheless this Court should, as a matter of inherent fairness to petitioner (always protesting its innocence and denying the validity of the findings of the Court of Appeals, based wholly upon inferences at least equally as consistent with innocence as with guilt) grant petitioner one review on the merits. If this Court shall not do so, then this anomalous proceeding, originating in a Court of Appeals, will stand without the protection of the "essential right of a litigator to have his cause examined in tribunals superior to the [redacted] in which he considers himself aggrieved."

Point II.

THE COURT OF APPEALS HAS NO POWER TO ADJUDICATE, AT LEAST IN THE FIRST INSTANCE, DISPUTED QUESTIONS OF FACT.

A brief resume of the facts will bring into bold relief the extraordinary character of the proceedings in the Court of Appeals.

The *Root* case was commenced in Delaware about 1930 by petitioner against Root Refining Company for infringe-

ment of certain patents. The causes were tried, judgments for petitioner entered, appeals taken to the Court of Appeals, judgments affirmed there, and rehearings denied. *Certiorari* was denied by this Court.

Thereafter, in 1939, petitioner and Root settled their controversy (328 U. S. 575).

In 1941, certain attorneys, who had previously represented Root but then represented other oil companies in litigation with petitioner, petitioned the Court of Appeals to investigate as to whether or not the judgments of affirmance in that court in the *Root* case in 1935 had been obtained through corruption of one of the judges. These attorneys, for want of a client before the court, filed their petition as *amici curiae*. Root, though invited, declined to be a voluntary party to those proceedings and was not sought to be brought in involuntarily by any legal process. Besides *amici curiae*, only petitioner was present in court and then only by informal invitation. The Court of Appeals appointed a master, who conducted hearings and filed a report advising that the judgments were tainted with fraud. The Court of Appeals affirmed the master's findings and ordered the judgments of affirmance set aside and a reargument of the causes.

Thereafter, this Court reversed an order awarding compensation and expenses in the investigation to *amici curiae* on the ground that the order setting aside the judgments of affirmance, upon whose validity the validity of the order granting compensation and expenses depended, was entered in a proceeding where the safeguards of adversary litigation had not been observed (328 U. S. 575).

Upon consideration of the decision of this Court, the Court of Appeals vacated its order setting aside the judgments of affirmance in the *Root* case, but directed that peti-

tioner show cause why such judgments should not be set aside for fraud. The court also authorized the Attorney General or a representative to appear *Amicus Curiae*. Three representatives of the Department of Justice did appear for the United States of America, *Amicus Curiae*. Thereupon, with leave of the Court of Appeals, the attorneys (*"amici curiae"* in the opinion of this Court in 328 U. S. 575) who had instituted the original investigation in 1941, withdrew.

At about the same time, Skelly Oil Company, which for many years had been engaged with petitioner's predecessor in patent infringement litigation involving a patent wholly dissociated from the patents involved in the *Root* case, asked leave to intervene in further proceedings in the investigation before the Court of Appeals or the District Court. This petition was granted. Thereafter in the spring of 1948, Skelly paid a large sum of money to petitioner's predecessor in settlement of the litigation between them and, by leave of the Court of Appeals, withdrew from the proceedings.

In the meantime, William Whitman Company, Inc., then the plaintiff in litigation with petitioner in Delaware, petitioned the Court of Appeals for leave to intervene for the purpose of attempting to prove, and obtaining the benefit of an adjudication, that petitioner had corrupted the Court of Appeals in connection with the judgments of affirmance in the *Root* case.

On January 16, 1948, the Chief Justice of the United States appointed Honorable Morris A. Soper, Circuit Judge, Honorable John C. Mahoney, Circuit Judge, and Honorable E. Barrett Prettyman, Associate Justice, to sit as the Court of Appeals for the Third Circuit in connection with further proceedings in this matter and one other matter. After preliminary conferences, at which jurisdic-

tional and other legal objections were presented to the Court of Appeals, as so constituted, the court passed its order dated April 6, 1948, in which it (a) formally approved of Skelly's withdrawal;* (b) formally permitted William Whitman Company, Inc. to intervene; (c) "formulated" the charges against petitioner; and (d) directed the representatives of the Department of Justice to present the evidence in the matter.

After overruling the objections of petitioner to jurisdiction and procedure, the court proceeded in May 1948 with the hearings on the merits and on July 6, 1948, entered the final judgment, for a review of which this application is filed. The judgment, *inter alia,* set aside for fraud the 1935 judgments of affirmance in the *Root* case. The facts were bitterly contested and disputed. Petitioner, through the mouths of living and dead witnesses, denied any wrongdoing, both generally and specifically. There was no direct or circumstantial evidence, we submit, sustaining the charge of fraud and corruption. The decision of the Court of Appeals is based entirely upon hypotheses and inferences, drawn from circumstances *at least* equally as consistent with innocence as with guilt.

There was before the court none of the issues involved in the original litigation between petitioner and Root in the *Root* case; the issue in the *Root* litigation was whether or not Root had infringed petitioner's patents, whereas the issue before the Court of Appeals was whether or not petitioner had bribed Judge Davis in connection with the affirmance of the judgments in the *Root* case.

Of the two original parties to the *Root* case, Root declined, as we have seen, to come into court and, indeed,

*Although Skelly had actually withdrawn on March 23, 1948, by leave of the court.

specifically disclaimed any interest whatever in the proceeding. Only your petitioner remained of the original parties to the *Root* case.

At the commencement of the hearings in May 1948 there were before the court, besides petitioner:

(a) the United States of America, *Amicus Curiae,* denominated by the Court of Appeals as "not a part of the case"; and

(b) William Whitman Company, Inc., intervenor by order of the Court of Appeals which said of Whitman that it had come in "to reap the benefit of the disclosures" and "in order to advance the suit for a return of royalties which it had brought against" petitioner.

Thus, we find a brand-new proceeding,* of some variety not known to the law, instituted originally in the Court of Appeals between William Whitman Company, Inc. and petitioner (for, as the court pointed out, the United States, *Amicus Curiae,* was not a "part of the case"), having to do with brand-new issues first raised in the Court of Appeals. The facts were sharply in controversy; no fact essential to the finding of fraud was undisputed.

The hearing of the evidence took place in the presence of the Court of Appeals; it was never submitted to any inferior tribunal, not even to a master. The questions of fact were all determined in the *first instance* by the Court of Appeals.

Under the foregoing circumstances, we respectfully submit that the Court of Appeals was without judicial power to conduct the hearings and reach conclusions of fact in the first instance.

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*For a more detailed description of all the proceedings, see the petition (pp. 3-16, *supra*).

Although the Court of Appeals is one of the inferior federal courts authorized by the Constitution, that document vests in Congress the right to establish the court and fix its jurisdiction (Constitution, Article III, Section 1), subject, of course, to the limitation of Section 2 of the same article.

Congress has vested the Court of Appeals exclusively with appellate jurisdiction (Title 28 U. S. C. § 1291-93).*

In accordance with the limitations of the statute, it is uniformly held that the Court of Appeals may not exercise original jurisdiction, but is limited to *the appellate jurisdiction granted by Congress. Whitney* v. *Dick,* 202 U. S. 132; *United States* v. *Mayer,* 235 U. S. 55; *Realty Co.* v. *Montgomery,* 284 U. S. 547; *Roche* v. *Evaporated Milk Assn,* 319 U. S. 21; *United States* v. *Moy Yee Tai et al.,* 2 Cir., 109 Fed. 1, *app. dism'd* 187 U. S. 652; *Zell* v. *Judges of Circuit Court,* 4 Cir., 149 Fed. 86, *aff'd* 203 U. S. 577; *Minnesota & Ontario Paper Co.* v. *Molyneaux,* 8 Cir., 70 F. 2d 545; *Hall* v. *United States,* 10 Cir., 78 F. 2d 168; *Stephenson* v. *Equitable Life Assur. Soc.,* 4 Cir., 92 F. 2d 406; *In re Philadelphia & Reading Coal & Iron Co.,* 3 Cir., 103 F. 2d 901; *Alderman* v. *Elgin, J. & E. Ry. Co.,* 7 Cir., 125 F. 2d 971; *Mutual Life Ins. Co. of New York* v. *Holly,* 7 Cir., 135 F. 2d 675; *United States* v. *Rabb,* 3 Cir., 147 F. 2d 225, *cert. den.* 324 U. S. 870; *Semel* v. *United States,* 5 Cir., 158 F. 2d 229.

In *Whitney* v. *Dick,* 202 U. S. 132, this Court stated (p. 137):

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*As this Court has so aptly said in *Scott* v. *McNeal,* 154 U. S. 34, 46:

> " 'To give such proceedings [as a matter of due process] any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; * * *.' "

> "It will be borne in mind that the Circuit Court of Appeals, which is a court created by statute, *Kentucky* v. *Powers,* 201 U. S. 1, 24, is not in terms endowed with any original jurisdiction. It is only a court of appeal. Section 2 of the act says that it 'shall be a court of record with appellate jurisdiction, as is hereafter limited and established.' Section 6 provides that it 'shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases,' etc. By section 10 'whenever on appeal or writ of error or otherwise a case coming from a Circuit Court of Appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper District or Circuit Court for further proceedings in pursuance of such determination.' Sections 4, 13 and 15 name the courts whose judgments may be reviewed in the Courts of Appeals. Obviously the Courts of Appeals are simply given appellate jurisdiction over certain specified courts. It follows that they are not authorized to issue original and independent writs of *habeas corpus.*"

The authorities are uniform that Courts of Appeals may not receive disputed evidence *dehors* the record. Undisputed evidence has been received in cases involving abatement or loss or lack of jurisdiction and in *Hazel-Atlas Co.* v. *Hartford Co.,* 322 U. S. 238, this Court held (p. 240) that, where undisputed facts were before the Court of Appeals, it might decide questions of law upon that record. In the *Hazel-Atlas* case, however, this Court expressly declined to decide whether "if the facts relating to the fraud were

in dispute and difficult of ascertainment, the Circuit Court here should have held hearings and decided the case" (*id.*, fn. 5, p. 249-50).

In *Price* v. *Johnston,* 334 U. S. 266, this Court said (p. 291):

> "Appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed."

In *Roemer* v. *Simon et al.,* 91 U. S. 149, this Court said (p. 150):

> "No new evidence can be received here."

In *Russell* v. *Southard et al.,* 12 How. 139, Chief Justice Taney said (p. 159):

> "This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting, as an appellate tribunal."

A fortiori, the same rule applies to the Court of Appeals also an appellate court. In *Realty Co.* v. *Montgomery,* 284 U. S. 547, this Court held that appellate courts may only affirm, reverse or modify a judgment on the basis of error in the certified record. This Court applied to the Court of Appeals the rule that this Court "could not receive new evidence".

This Court has distinguished between the consideration of undisputed evidence by an appellate tribunal and its reception of and adjudication upon disputed testimony. In the former case the appellate court may act; in the latter

it may not. *Dakota County* v. *Glidden*, 113 U. S. 222, 226-7, explaining *Bd. of Liquidation* v. *L. & N. R. R. Co.*, 109 U. S. 221. That distinction has never been overruled by this Court.

We therefore respectfully urge:

(a) that the Court of Appeals, as an appellate tribunal, is without jurisdiction to entertain a new lawsuit between new parties upon novel issues not theretofore submitted to or tried by a court of original jurisdiction; and

(b) that, even if it be assumed that the Court of Appeals had power to entertain such a proceeding, it cannot receive testimony on disputed questions of fact and adjudicate them.

Point III.

THERE WAS BEFORE THE COURT OF APPEALS NO CASE OR CONTROVERSY AS REQUIRED BY THE CONSTITUTION.

A. The Jurisdiction of Federal Courts is Limited by the Constitution to Cases or Controversies.

Although all inferior federal courts are statutory courts in that they are created by an Act of Congress pursuant to Article III, Section 1, of the Constitution, they are nevertheless constitutional courts, and their jurisdiction is limited by Article III, Section 2, of the Constitution. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227; *Ex Parte Bakelite Corp'n*, 279 U. S. 438; *Muskrat* v. *United States*, 219 U. S. 346.

The pronouncements of this Court leave no doubt that all federal courts are limited in their jurisdiction to "cases" and "controversies". *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227; *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *Osborn* v. *U. S. Bank,* 9 Wheat. 738; *In re Pacific Ry. Com'n,* N. D. Cal., 32 Fed. 241.

Thus in *Liberty Warehouse Co.* v. *Grannis, supra,* this Court referred to the jurisdictional limitation imposed by Section 2 on the federal courts as follows (p. 74):

> "It suffices to say that in the light of the decisions in *Muskrat* v. *United States,* 219 U. S. 346, 357; *Fairchild* v. *Hughes,* 258 U. S. 126, 129; *Texas* v. *Interstate Commerce Comm.,* 258 U. S. 158, 162; *Keller* v. *Potomac Elec. Co.,* 261 U. S. 428, 444; *Massachusetts* v. *Mellon,* 262 U. S. 447, 488; *New Jersey* v. *Sargent,* 269 U. S. 328, 330; and *Postum Cereal Co.* v. *California Fig-Nut Co.,* 272 U. S. 693, in which the principles stated in earlier cases are considered and applied—*it is not open to question that the judicial power vested by Article III of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder, extends only to 'cases' and 'controversies' in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights,** or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable

*Italics supplied unless otherwise indicated.

> of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case."

In *Osborn* v. *U. S. Bank,* 9 Wheat. 738, this Court, speaking through Chief Justice Marshall, referred to the same limitation, saying (p. 819):

> "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. *That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.* It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States."

A judgment rendered in a proceeding which is not a case or controversy within the meaning of the many decisions of this Court is a complete nullity and void. *Lord* v. *Veazie,* 8 How. 251, 256; *O'Donnell* v. *United States,* 9 Cir., 91 F. 2d 14.

This Court has repeatedly defined the words "cases" and "controversies".

B. There Can Be No Case or Controversy Without an Actual Controversy.

Since the existence of a controversy is a basic prerequisite of federal jurisdiction, it follows that, whenever by settlement of the parties or otherwise the existing controversy has come to an end, the case becomes moot and a federal court is rendered powerless thereafter to act in the matter. *United States* v. *Alaska S. S. Co.*, 253 U. S. 113; *Walling* v. *Shenandoah-Dives Mining Co.*, 10 Cir., 134 F. 2d 395; *St. Pierre* v. *United States*, 319 U. S. 41; *Alejandrino* v. *Quezon*, 271 U. S. 528; *Brownlow* v. *Schwartz*, 261 U. S. 216; *Buck's Stove &c. Co.* v. *Am. Fed. of Labor*, 219 U. S. 581; *American Book Co.* v. *Kansas*, 193 U. S. 49; *Mills* v. *Green*, 159 U. S. 651; *Dakota County* v. *Glidden*, 113 U. S. 222; *Paradise Land & Livestock Co.* v. *Federal Land Bank, Etc.*, 10 Cir., 147 F. 2d 594, *cert. den.* 326 U. S. 717.

In *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, the doctrine was stated as follows (p. 116):

> "* * * it is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it. *Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly.* However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules or law which can-

> not affect the result as to the thing in issue in the case before it. *No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.' California* v. *San Pablo & Tulare R. R. Co.,* 149 U. S. 308, 314; *United States* v. *Hamburg-American Line,* 239 U. S. 466, 475, 476, and previous cases of this court therein cited."

Similarly, in *Walling* v. *Shenandoah-Dives Mining Co.,* 10 Cir., 134 F. 2d 395, the Court of Appeals held that it had no jurisdiction of a cause that had become moot, saying (p. 396-7):

> "Under Article 3, Section 2 of the Constitution, the United States federal courts have jurisdiction to hear and determine 'cases and controversies.' A moot question does not present a case or controversy within the meaning of the Constitution. *When in the course of a trial the matter in controversy comes to an end, either by an act of one or both of the parties or by operation of law, the question becomes moot and the court is without further jurisdiction in the matter."*

Judged by these principles, the instant proceeding, we respectfully submit, was not in 1941, and has not since that time been, a case or controversy under the Constitution and, consequently, the Court of Appeals was without power to take any juridical action therein affecting the property of petitioner.

Although the judgment and orders of the Court of Appeals in the instant proceeding are captioned as if they

occurred in the *Root* case, no controversy has existed between Root and petitioner, the only parties to the *Root* case, since 1939 (328 U. S. 575, 577). At that time Root settled its controversy with petitioner in that case and thereafter declined to make itself a party, or to be made a party to further proceedings, concededly preferring its settlement to reopening the case and rearguing the appeal (*ibid.*). In 1944 petitioner and Root entered into a further general settlement in which, among other things, it was prcvided that either party might vacate the judgments of the District Court in the *Root* case and dismiss the complaints. Never to this date has Root appeared or asserted any further interest in the *Root* case nor has any process issued addressed to it.

On these facts, all of which were before this Court in *Universal Oil Co.* v. *Root Rfg. Co.*, 328 U. S. 575, it was held, we believe, that there was no longer any controversy in the *Root* case. Thus this Court said (p. 577-8):

> "They [*amici curiae*] urged an investigation of the questionable features surrounding affirmance of the *Root* decree, but *expressed doubt as to the capacity* in which they could formally make such a request of the Court. Their difficulty was due to the fact that after this Court had denied *certiorari* in the *Root* case, *Root had settled its controversy with Universal and was unwilling to disturb the agreement by an attempt to reopen the law suit.* The other oil companies who were in litigation with Root insisted that they were neither formal nor substantial parties to the *Root* case. And so their attorneys, who were the attorneys in the *Root* litigation and the moving attorneys in the present proceedings, could not move

> on their behalf to have the *Root* decree vacated. But these other oil companies had an interest in the *Root* decree since it might be used in pending cases to their disadvantage. Universal offered to consent to a reargument of the *Root* case and to preserve to the Root Company the benefits of the existing agreement, even if Universal should prevail upon reargument. Throughout these proceedings Universal stood ready to carry out this offer, but nothing ever came of it, presumably because Root was not represented at these hearings and the other oil companies were not parties of record in the original litigation."

Of the two patents involved in the *Root* case, one was held invalid by this Court and the other was held not infringed (*Universal Oil Co.* v. *Globe Co.*, 322 U. S. 471) and, in any event, the latter patent expired in 1938.

Under these circumstances, we submit that, as between petitioner and Root, the *Root* case was wholly moot prior to the commencement of these proceedings and, hence, there was no longer any existing controversy between them of which any federal court had jurisdiction.

This fundamental defect was not cured by the intervention of the Whitman Company, the very *raison d'etre* of whose intervention depended upon the pendency of a preexisting justiciable case or controversy.* *Kendrick* v.

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*The intervention of Whitman, it will be recalled, was claimed to be in aid of a suit which it already had pending against petitioner in Delaware. In that suit Whitman charged fraud and misrepresentation on the part of petitioner in 1938 or thereabout with respect to the judgments of affirmance in the *Root* case. The court below pointed out that most of the evidence had been produced in the first investigation and that Whitman had "come in to reap the benefits of the disclosures, * * * in order

Kendrick, 5 Cir., 16 F. 2d 744, *cert. den.* 273 U. S. 758; *Godfrey L. Cabot, Inc.* v. *Binney & Smith Co.*, D. N. J., 46 F. Supp. 346; *Haase* v. *Haase*, 261 Ill. 30, 103 N. E. 628.

In *Kendrick* v. *Kendrick, supra*, the court, in holding that a petition for intervention could not be granted by a court which lacked jurisdiction, said (p. 745):

> "An existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit or action by which a third person is permitted to make himself a party, either joining the plaintiff in claiming what is sought by the complaint, or uniting with the defendant in resisting the claims of the plaintiff, or demanding something adversely to both of them. * * * As the record does not show that at the time the petition to intervene was presented there was pending any suit or proceeding within the court's jurisdiction, that petition was not allowable."

Similarly, in *Godfrey L. Cabot, Inc.* v. *Binney & Smith Co.*, D. N. J., 46 F. Supp. 346, the court stated the proposition as follows (p. 347):

> "Intervention presupposes the pendency of a suit in a court of competent jurisdiction, and one who voluntarily becomes a party thereto, impliedly, if not expressly, accepts the proceedings as he finds them at the time of the intervention * * *."

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to advance its suit for a return of royalties which it has paid" petitioner.

The allegations of Whitman against petitioner are later shown not to constitute "a real and substantial controversy admitting of specific relief through a decree of a conclusive character" (p. 57, *infra*).

C. There Can Be No Case or Controversy Without Adverse Parties Asserting Adverse Interests.

This Court has consistently held that an absolute *sine qua non* of a constitutional case or controversy is the *initial* and *continued* presence of adverse parties asserting adverse interests. *Muskrat* v. *United States,* 219 U. S. 346; *Lord* v. *Veazie,* 8 How. 251; *O'Donnell* v. *United States,* 9 Cir., 91 F. 2d 14.

In *Lord* v. *Veazie,* 8 How. 251, this Court said (p. 255):

> "It is the office of courts of justice to decide the rights of persons and of property, when the persons interested cannot adjust them by agreement between themselves,—and to do this upon the full hearing of both parties. And any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.
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> * * * * * * *
>
> *"But there must be an actual controversy, and adverse interests.* The amity consists in the manner in which it is brought to issue before the court. And such amicable actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties. *The objection in the case before us is, not that the proceedings were amicable, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same*

> *interest,* and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be."

In *O'Donnell* v. *United States,* 9 Cir., 91 F. 2d 14, 20, the Court of Appeals held that a judgment obtained in a prior proceeding was invalid and not binding upon the instant appellants because it had been rendered in a non-adversary action "in which the claimant and defendant were one, and hence no justiciable issue existed upon which adjudication could be had."

The Court will not be bound by the title of the cause which may, on its face, indicate the presence of adverse parties, but will inquire into the nature of the action to determine whether there are adverse parties asserting adverse interests. In *Muskrat* v. *United States,* 219 U. S. 346, this Court, in holding that there were no adverse parties even though there purported to be, said (p. 361):

> "It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part."

Even though a controversy between adverse parties may exist at the time a case is commenced, if at any stage in the litigation the adversary character of the parties ceases, the court loses jurisdiction and the court's power thereafter to act in the case also ceases. *South Spring Gold Co.* v. *Ama-*

dor Gold Co., 145 U. S. 300; *Cleveland* v. *Chamberlain*, 1 Black 419.

In the *Chamberlain* case, *supra*, this Court held that there was no justiciable controversy before it because the defendant had become the sole party in interest on both sides. Thus this Court said (p. 426):

> "It is plain that this is no adversary proceeding, no controversy between the appellant and the nominal appellee. It differs from the case just cited in this alone, that *there* both parties colluded to get up an agreed case for the opinion of this court; *here*, Chamberlain becomes the sole party in interest on both sides, makes up a record, and has a case made to suit himself, in order that he may obtain an opinion of this court, affecting the rights and interest of persons not parties to the pretended controversy."

In *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300, it was held that a constitutional controversy no longer existed in the action since both the defendant and plaintiff corporations had come into the same hands. In so ruling, the Court stated "the litigation has ceased to be between adverse parties, and the case therefore falls within the rule applied where the controversy is not a real one" (p. 301).

Were there any adverse parties in the *Root* case in 1941 or thereafter? Certainly Root did not qualify as such. As we have shown, not only had Root settled its controversy with petitioner, but it refused in 1941 and thereafter to be represented at the proposed investigation.

In the absence of any controversy between Root and petitioner, between what adverse parties could a controversy be said to have existed in the *Root* case after 1939?

Amici curiae, who originally suggested the investigation in 1941, as such had no controversy with petitioner in the *Root* case. As individuals, they asserted no claims against petitioner. This Court specifically found that they were compelled to adopt the role of *amici* because they did not represent any parties to the *Root* case and remained only *amici* throughout (*Universal Oil Co.* v. *Root Rfg. Co.,* 328 U. S. 575, 578). In any event, as we have previously shown, original *amici curiae* withdrew by permission of court on July 30, 1947.

The United States of America, *Amicus Curiae,* stands in no position different from that of original *amici curiae* herein or from that of counsel for the O. P. A. in *Brown* v. *Wright,* 4 Cir., 137 F. 2d 484. The court there said (p. 487):

> "* * * the appearance of counsel would have been an appearance amicus curiae and not an appearance in behalf of a party."

The Court of Appeals here has recognized such to be the status of United States of America, *Amicus Curiae,* for it has specifically held it was "not a part of the case".

Neither Skelly Oil Company, whose intervention was permitted in June 1947, and which withdrew from the proceedings, with leave of court, on March 23, 1948, nor the Whitman Company, whose intervention was permitted on April 6, 1948, was a "party" asserting the necessary adversary interests prescribed by the decisions of this Court (pp. 38, 50-1, *supra;* pp. 61-2, *infra*).

The Court of Appeals recognized the anomalous character of the proceeding which it "visualized * * * as a proceeding by the Court, or at the instance of the Court and for

the purpose of purging the record, if that be needed." Like the Master in the prior proceeding condemned by this Court in 328 U. S. 575, the Court of Appeals considered the present proceeding as one "undertaken and prosecuted as an *investigation* by the court itself into the integrity of its own judgment; and it [the Court of Appeals] would have proceeded to a final conclusion with or without the assistance or intervention of private parties."

D. There Can Be No Case or Controversy Unless a Legally Protected Interest is Asserted.

It is axiomatic that one invoking the aid of a court must state a cause of action cognizable in the forum appealed to. A cause of action is frequently referred to as the enforcement of a "legally protected" right or interest. Such a right or interest must spring from the common law or be created by statute. In the federal courts, at least, the assertion of a claim which does not fall within the foregoing description does not constitute a "case" or "controversy" under the Constitution. *Oklahoma* v. *Civil Service Comm'n,* 330 U. S. 127;* *Tennessee Power Co.* v. *T. V. A.,* 306 U. S. 118; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113; *New Jersey* v. *Sargent,* 269 U. S. 328; *Associated Industries* v. *Ickes,* 2 Cir., 134 F. 2d 694; *Stark* v. *Wickard,* C. A. D. C., 136 F. 2d 786.

As we have seen, the United States, *Amicus Curiae,* was not a party (pp. 40, 55, *supra*) and therefore asserted no juridically recognized adverse claim against petitioner.

Did the Whitman Company, by its intervention, assert such a claim? We think not.

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*It must be a legal right, *i.e.,* one of property, one arising out of contract, one protected against tortious invasion, or one founded upon a statute which confers an enforceable privilege.

Whitman, in support of its motion for leave to intervene, stated that it "is not complicating these proceedings by asking for individualized relief, neither judgment for money nor for equitable relief". That candid statement, which is readily supported by the nature of the intervention sought, disclosed the basic defect which is fatal to its assertion in the Court of Appeals of an adverse claim against petitioner.

Whitman did not here ask "specific relief through a decree of a conclusive character" (*Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 241) as redress for the invasion of a legally protected interest. In admitting this, it conceded that it sought in the Court of Appeals merely a determination *in vacuo* of one of the issues in its action against petitioner pending in the District Court in Delaware, *viz.*, a finding that the *Root* judgments were fraudulently obtained. But such a determination was not the ultimate relief sought or, as this Court has put it, "an immediate and definitive determination of the legal rights of the parties" (*ibid.*) with respect to the relief which it ultimately seeks against petitioner in the Delaware action. There it prays for a rescission and restitution or, in the alternative, a reformation of its license agreement with petitioner. On neither theory did the setting aside of the *Root* judgments become determinative, for Whitman will still be obliged to continue its litigation in Delaware to a successful conclusion on the other issues.

In effect, Whitman therefore sought to be permitted to participate in the hearings solely for the purpose of obtaining an advisory opinion by the Court of Appeals. Such a determination may not be rendered in a federal court. *Coffman* v. *Breeze Corporations,* 323 U. S. 316; *Willing* v.

Chicago Auditorium, 277 U. S. 274. As the court below pointed out, Whitman had "come in * * * in order to advance its suit for a return of royalties which it has paid" petitioner. In other words, Whitman, as it frankly conceded, did not ask for individualized relief in these proceedings. That is precisely what this Court condemned in *Coffman* v. *Breeze Corporations, supra.*

In that case plaintiff, a patent owner, brought an action to enjoin his licensees from paying accrued royalties to the Government under the Royalty Adjustment Act, and to have that Act declared unconstitutional. The defendant refused to contest the validity of the Act and alleged that, whether the Act was valid or invalid, it did not owe any royalties to plaintiff. Plaintiff asked for "no judgment for the recovery of the royalties alleged to be due" from the defendant.

Plaintiff had also brought an action in another jurisdiction to recover royalties under its license contracts from defendant. That cause was at issue and the court there had preliminarily ruled that the plaintiff might recover all royalties which had accrued or might accrue to the date of trial.

In holding that the proceeding before it did not constitute a justiciable case or controversy, since plaintiff was only seeking an advisory opinion of the validity of a defense to its suit for royalties, this Court said (p. 323-4):

> "So far as the present suit seeks a declaratory judgment or an injunction restraining payment of the royalties into the Treasury, it raises no justiciable issue. Appellant asserts in the present suit no right to recover the royalties. It asks only a determination that the Royalty Adjustment Act is unconstitutional and, if so found, that compliance with the Act

be enjoined, an issue which appellee by its answer declines to contest. If contested the validity of the Act would be an issue which, so far as it could ever become material, would properly arise only in a suit to recover the royalties, where it could be appropriately decided.

"In the circumstances disclosed by the record and for purposes of the present suit, the constitutionality of the Act is without legal significance and can involve no justiciable question unless and until appellant seeks recovery of the royalties, and then only if appellee relies on the Act as a defense. *The prayer of the bill of complaint that the Act be declared unconstitutional is thus but a request for an advisory opinion as to the validity of a defense to a suit for recovery of the royalties.* Appellee could have made such a defense but does not appear to have done so in the pending accounting suit and does not assert its validity here. The bill of complaint thus fails to disclose any ground for the determination of any question of law or fact which could be the basis of a judgment adjudicating the rights of the parties."

We submit that the determination by the Court of Appeals in this proceeding of the issue of fraud as between Whitman and petitioner was merely a forbidden advisory opinion upon an abstract question not resolving "a real and substantial controversy admitting of specific relief". *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 241. Hence the intervention of the Whitman Company added nothing to the jurisdiction of the Court of Appeals.

E. The Court of Appeals Was Not Powerless to Have Acted Effectively in Other Ways.

Although, we respectfully submit, the foregoing arguments demonstrate that there were before the Court of Appeals no case, no controversy, no pleadings, no parties, no adverse interests and no assertion of a legally protected interest, nevertheless this does not mean that the Court of Appeals lacked the power "to unearth * * * a fraud" perpetrated against it and "to unearth it effectively" (328 U. S. 575, 580).

The lower court might have acted effectively in a variety of ways. For example, it might (1) have spread upon its record the testimony taken at the investigation and the report, thus bringing the opprobrium of publicity and the righteous indignation of the court into focus upon the malefactors, if any; (2) have commenced disciplinary proceedings against officers of the court; (3) have suggested or caused the commencement of contempt of court proceedings; and (4) have made available to public prosecutor and private litigant alike the testimony and the report.

The foregoing, we respectfully suggest, would have constituted an effectual unearthing of fraud against the court and should have fully satisfied the strictest requirements of a court properly jealous of its honor.

We have protested that, in the proceeding heretofore described and by the means adopted by the Court of Appeals, petitioner has been unjustly and unwarrantably brought to task and deprived of its property in violation of due process of law and of other established Constitutional principles.

Point IV.

THE COURT OF APPEALS, IN GRANTING LEAVE TO WILLIAM WHITMAN COMPANY, INC. TO INTERVENE, ACTED WITHOUT JURISDICTION AND IN A MANNER CONTRARY TO THE DECISIONS OF OTHER COURTS OF APPEAL.

1. Since the existence of a case or controversy was a prerequisite to Whitman's intervention, the Court of Appeals had no jurisdiction to make and enter the orders granting leave to intervene. *Kendrick* v. *Kendrick,* 5 Cir., 16 F. 2d 744, 745, *cert. den.* 273 U. S. 758; *Godfrey L. Cabot, Inc.* v. *Binney & Smith Co.,* D. N. J., 46 F. Supp. 346, 347; *Haase* v. *Haase,* 261 Ill. 30, 32, 103 N. E. 628.

In granting Whitman leave to intervene, however, it would seem that the lower court sought to cure this fundamental jurisdictional defect by permitting Whitman to "lift itself by its own bootstraps", *i.e.,* it in effect attempted to create a case or controversy by the intervention itself. The obvious defect in such reasoning is, of course, that any interest which Whitman had was not in any preexisting case or controversy but in the case or controversy which the court purported to create by allowing the intervention.

If Whitman may only intervene in an existing case or controversy, how can its intervention create such a case or controversy?

In any event, as we have seen (p. 57, *supra*), Whitman did not assert, in this proceeding, a legally protected interest and did not seek "a decree of a conclusive character" both of which are prerequisite to the existence of a case or controversy in the constitutional sense.

2. Moreover, the order granting leave to intervene is contrary to the rule, obtaining in many other Courts of Appeals, that intervention will not be permitted for the first time in an appellate court. *Wenborne-Karpen Dryer Co.* v. *Cutler Dry Kiln Co.*, 2 Cir., 292 Fed. 861; *Veitia* v. *Fortuna Estates*, 1 Cir., 240 Fed. 256; *Morin* v. *City of Stuart*, 5 Cir., 112 F. 2d 585. See *Smith* v. *American Asiatic Underwriters*, 9 Cir., 134 F. 2d 233, 236. *Cf. United States* v. *Patterson*, 15 How. 10.

3. Even if there were a case or controversy here involved, the intervention permitted below at this late date is contrary to the weight of authority. Whitman knew of the investigation as early as June 1941 and original *amici curiae* had been its counsel, but it did not seek to intervene until December 30, 1947. *Roberts* v. *Metropolitan Life Ins. Co.*, 7 Cir., 94 F. 2d 277, 281; *American Brake Shoe & F. Co.* v. *Interborough R. Tr. Co.*, 2 Cir., 112 F. 2d 669; *Baltimore Trust Co.* v. *Interocean Oil Co.*, D. Md., 30 F. Supp. 484, 485; *The American Eagle*, D. Del., 28 F. 2d 1000, 1001.

Point V.

THE COURT OF APPEALS LACKED JURISDICTION TO DIRECT THE DISTRICT COURT TO VACATE THE JUDGMENTS AND DISMISS THE COMPLAINTS IN THE *ROOT* CASE.

In the *Root* case judgment went for plaintiff in the District Court. That judgment has never been criticized or impeached in any wise whatsoever.

When Root, the losing party, appealed to the Court of Appeals it, not petitioner, sought relief. The alleged fraud

occurred, not in connection with an effort to reverse the District Court, but in connection with retaining judgments honestly granted there.

Had petitioner been the losing party in the District Court and had it, through fraud and corruption, obtained a reversal in its favor in the Court of Appeals, then, upon vacating the judgments of reversal, the Court of Appeals would have left undisturbed the action of the District Court in dismissing the original complaints. By a parity of reasoning, when the Court of Appeals vacated the judgments of affirmance, it had power only to direct a reargument by the parties to the *Root* suit, in default of which the honestly rendered judgments of the District Court would stand.

Point VI.

THE ACTION TAKEN BY THE COURT OF APPEALS VIOLATES THE CONCEPTS OF DUE PROCESS OF LAW.

Over and above the other questions raised in this brief, including those affecting the jurisdiction of the Court of Appeals, we respectfully submit that the entry of the judgment by that court on July 6, 1948 and the taking of all the proceedings leading up to the judgment have resulted in depriving petitioner of its property without due process of law within the meaning of the Fifth Amendment.

Due process, it seems to us, entitles a person, before being deprived of his liberty or his property, to be apprised and brought into a court of competent jurisdiction in the ordinary way by ordinary process; to have the case proceed in the usual way prescribed by the Federal Rules of Civil Procedure; to be notified of the nature of charges or claims against him by ordinary pleadings and to have the oppor-

tunity to make motions addressed thereto as permitted by the rules; in due course to have the case come on before a judge authorized to sit on the case in the usual course of litigation; to have the cause tried before him, with or without a jury as plaintiff's rights and preferences demand; and to have judgment entered and costs taxed in a manner consistent with the usual and ordinary practice; and, if he be the losing party in such a case, to have an appeal as a matter of right to the Court of Appeals and, losing upon that appeal, the opportunity granted in the usual way of applying to this Court for a further review by writ.

Now, in the proceeding before the Court of Appeals here, none of these things happened.

The proceeding was commenced in the Court of Appeals by its own order to show cause, thereby immediately depriving petitioner of one review as a matter of right.

No facilities were provided for the trial of the issues here involved by a jury, to which petitioner was entitled as a matter of law.

No pleadings in the usual sense were filed, as is evidenced by the nondescript titles given to documents which purported to be substituted for pleadings. For example, there were no "complaints" filed; instead a series of documents called "An Order to Show Cause", a "Statement of Ultimate Facts", and "Averments". There were no answers; instead petitioner with respect to some of the documents presented filed a "Response" and with respect to others was deemed by the court to have entered a general denial without the filing of any paper.

It seems to us not to be an answer to the foregoing objections that, at least in some aspects of the matter, petitioner was afforded improvised and rough and ready sub-

stitutes for the usual and regular procedure of the courts.

We believe that petitioner was entitled, as a matter of due process, to have all of the same facilities and machinery of the courts function with respect to charges against it, as are usually afforded other litigants.

This Court said in *Scott* v. *McNeal,* 154 U. S. 34, 46:

> "The words 'due process of law', when applied to judicial proceedings, * * * 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. * * *' "

It does not require a profound exegesis to demonstrate that in the loss of these facilities—which taken singly may not seem of consequence—petitioner has been substantially deprived of the right to proceed in the way contemplated by the statutes and the rules of court. When it has been deprived of this right so to proceed, we urge there is a lack of due process.

Point VII.

THE TAXATION OF COSTS SHOULD BE REVERSED.

If the Court of Appeals lacked jurisdiction, then no costs may be taxed against petitioner.

If the lower court is reversed, then taxation of costs will be reversed.

In any event, however, there is no warrant for taxing against this petitioner any part of the taxable costs and disbursements in *American Safety Table Company* v. *Singer Sewing Machine Company.*

CONCLUSION

For the foregoing reasons it is submitted that the petition herein should be allowed and that the judgment of the Court of Appeals, dated July 6, 1948, and the orders of the Court of Appeals dated respectively, June 20, 1947, April 6, 1948 and October 27, 1948, in so far as the same are here sought to be reviewed, should be reviewed and reversed.

Respectfully submitted,

RALPH S. HARRIS,
Attorney for Petitioner.

JOHN R. MCCULLOUGH,
ADAM M. BYRD,
LEO L. LASKOFF,
H. ALLEN LOCHNER,
Of Counsel.

November 30, 1948.

APPENDIX

Order dated June 20, 1947

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

No. 5648
October Term 1934

ROOT REFINING COMPANY,
Defendant-Appellant,

v.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

ORDER*

Present: BIGGS, MARIS, GOODRICH, MCLAUGHLIN and KALODNER, *Circuit Judges.*

AND NOW, to wit, this 20th day of June, 1947, it is

ORDERED that the intervention of Skelly Oil Company, as prayed for by it, be and the same hereby is authorized and allowed; and it is

*An identical order was entered in case No. 5546, bearing the identical caption.

FURTHER ORDERED that the order of this court of June 15, 1944, setting aside and vacating the judgment of this court entered on June 26, 1935 be and the same hereby is vacated; and it is

FURTHER ORDERED that Universal Oil Products Company appear and show cause, if any there be, why the said judgment of this court entered on June 26, 1935 should not be set aside and vacated by reason of alleged fraud and corruption practiced upon this court by Universal Oil Products Company or those acting on its behalf; and it is

FURTHER ORDERED that the rule to show cause embodied in the preceding paragraph be made returnable on October 13, 1947; and it is

FURTHER ORDERED that the Attorney General of the United States, or some member of the staff of the Department of Justice designated by the Attorney General, be and he hereby is authorized to appear as *amicus curiae*.

By the Court

BIGGS
United States Circuit Judge.

APPENDIX

Order dated April 6, 1948

United States Circuit Court of Appeals

THIRD CIRCUIT

Nos. 5648 and 5546

ROOT REFINING COMPANY,
Defendant-Appellant,

vs.

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

This order of court is passed this *sixth* day of April, 1948, in view of the prior proceedings, which for present purposes may be summarized as follows:

1. On the 26th day of June, 1935, judgments were rendered in these cases in accordance with an opinion written by United States Circuit Judge J. Warren Davis, and filed herein on June 26, 1935, 78 F. 2d 991, whereby the Dubbs and Egloff patents were held valid and infringed.

2. On June 5, 1941, an informal hearing was held in these cases by certain judges of this court who did not participate in the decision of these cases, at which hearing there were considered certain statements made by the at-

torneys of the defendants in certain other suits brought in divers District Courts of the United States by Universal Oil Products Company for infringement of the same patents in which suits Universal relied upon the said judgments as precedents or as res adjudicata. Universal was represented by attorneys at said hearing but Root Refining Company was not, since it had made a final settlement with Universal with respect to the matters in litigation. During the hearing, certain matters bearing upon the conduct of Judge Davis in said cases were brought to the attention of the court and the attorneys for the defendants in the cases in other districts were authorized by the court to bring said matters formally to its attention as amici curiae. On June 20, 1941, said attorneys filed a petition as amici curiae in which it was stated that Judge Davis, together with Morgan S. Kaufman, an attorney, and William Fox had been prosecuted under an indictment which charged a conspiracy to obstruct justice, and that Davis had accepted bribes from Kaufman in connection with litigation growing out of the bankruptcy of Fox; and that Fox pleaded guilty, and Davis and Kaufman were twice tried, but that the juries failed to agree. The petition further alleged that the testimony at the criminal trial tended to show that Universal had employed Kaufman as its attorney in these cases in order to effect an illicit arrangement with Davis for Universal's benefit; and that Kaufman had received remuneration from Universal although he was not a patent attorney and had rendered no legal services in the patent cases; and that Kaufman, subsequent to the decision in Universal's favor herein, had loaned $10,000 to Charles Stokley, a cousin of

Davis, in November, 1935, as an indirect means of compensating Davis for his opinion. The petition prayed the court, in the exercise of its inherent power, to inquire into a charge of fraud affecting the integrity of the court, to appoint a special master to investigate and report his conclusions in regard to the charges. Universal, in answer to this petition, denied that it had engaged in any fraudulent practice, but proposed that the judgments be vacated and that the cases be reargued on their merits.

3. On November 26, 1941, the court appointed a special master to investigate and report concerning the charges, and the master conducted an investigation and held hearings at which the amici curiae and the attorneys for Universal participated. On October 19, 1943, the master filed his report in which he found that Davis had been bribed in the patent cases and in the Fox litigation, and that during the years 1935 to 1938 there existed a corrupt and illicit combination between Davis and Kaufman to obstruct justice. Universal filed exceptions to the master's report.

4. On June 15, 1944, the court adopted the master's findings of fact and conclusions of law and vacated the judgments and placed the cases on the reargument list.

5. On May 29, 1944, the Supreme Court rendered an opinion in Universal Co. v. Globe Co., 322 U. S. 471, in which it held that the Dubbs patent was not infringed and the Egloff patent was invalid. The Dubbs patent has since expired.

6. On December 29, 1944, the court filed an opinion, 147 F. 2d 259, wherein it held that Universal should pay a fee to the master for his services and should also pay a fee for services to the attorneys who acted as amici curiae, together with a sum to cover their out-of-pocket expenses. The Supreme Court reviewed this decision on writ of certiorari, in an opinion filed June 10, 1946, 328 U. S. 575. It upheld the order of this court insofar as it directed Universal to pay the master's fees and expenses, but it held that it was improper to require Universal to pay the fees and the expenses of the amici curiae. It pointed out that a federal court has the inherent power to investigate whether a judgment was obtained by fraud, and for this purpose may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But the court pointed out that the special master's investigation was not governed by the customary rules of trial procedure and that the court could not deprive a successful party of his judgment without a proper hearing. Since such a judgment could not be nullified without opportunity to be heard in a proper contest, it was not just to assess against Universal the fees of attorneys and their expenses in conducting the investigation.

7. On October 29, 1946, Skelly Oil Company filed a petition for leave to intervene on the ground that it was engaged in litigation over another patent with Universal in the District Court of Delaware and that said litigation was related to the instant cases and was therefore affected by the fraud perpetrated by Universal therein; and on June

20, 1947, this motion was granted. On March 17, 1948, Skelly petitioned for leave to withdraw from the cases on the ground that it had settled its differences with Universal.

8. On December 19, 1946, Universal called this court's attention to the comments of the Supreme Court in Universal Oil Co. v. Root Rfg. Co., 328 U. S. 575, upon the procedure of the master in conducting the investigation, and moved the court to rescind its order of June 15, 1944, whereby the judgments herein were vacated. On June 20, 1947, this court vacated said order but directed Universal to show cause why said judgments should not be set aside by reason of the fraud alleged to have been practiced by Universal as above described; and at the same time the court authorized the Attorney General of the United States to appear as amicus curiae and granted Skelly's petition for intervention as aforesaid. On July 1, 1947, certain assistants of the Attorney General entered their appearance for the United States, amicus. On July 30, 1947, the original amici curiae withdrew.

9. On September 18, 1947, Universal petitioned the Supreme Court for writs of certiorari and for leave to file petitions for writ of mandamus and prohibition to forbid further proceedings in the instant cases in this court on the ground that there was no case or controversy before the court and hence the court was without power to require Universal to show cause why the judgments should not be vacated. On November 10, 1947, the Supreme Court denied these petitions. See 16 Law Week, 3086 and 3150.

Appendix

10. On December 26, 1947, the Senior Judge of the Third Judicial Circuit of the United States certified that by reason of the volume, accumulation, or urgency of business in the circuit, or the disability or necessary absence from the circuit of one or more of the circuit judges, the Circuit Court of Appeals of the circuit was unable to perform speedily the work brought before it, and on January 16, 1948, the Chief Justice of the United States designated and assigned the Honorable E. Barrett Prettyman, the Honorable John C. Mahoney, and the Honorable Morris A. Soper to act as circuit judges in such circuit and discharge all of the official duties of the circuit judges thereof in connection with the following cases: Root Refining Company v. Universal Oil Products Company, No. 5546; Root Refining Company v. Universal Oil Products Company, No. 5648, and American Safety Table Company v. Singer Sewing Machine Company, No. 6459, such designation and assignment to be for the period required to enable the said designated and assigned judges to dispose of said cases.

11. On December 31, 1947, William Whitman Co., Inc., petitioned for leave to intervene in these cases stating that Universal had sued Whitman's predecessor for infringement of the patents involved herein, and, on the strength of the judgments herein, had induced said predecessor to take a license under the patents and pay royalties to Universal until June 15, 1944, when the judgments herein were vacated; that Whitman had sued Universal in the District Court of Delaware for the revocation of the licenses and the repayment of the royalties on the ground that said

judgments were procured by fraud, as found in the master's report, and hence Whitman has an interest in the outcome of the present proceedings and should be allowed to participate therein.

12. On February 10, 1948, Universal, begging leave if thereafter necessary to deny any charges of fraud or wrongdoing on its part, moved the court to dismiss the rule to show cause imposed upon it on June 20, 1947, contending that any controversy heretofore existing in these cases is now moot since it has reached a settlement with the Root Refining Company, and since one of the patents involved has been declared invalid by the Supreme Court and the other patent has expired; that Skelly has no standing to answer any claim adverse to Universal in this proceeding, and that the court is without jurisdiction to continue the proceeding since there is no justiciable case or controversy before it.

13. On February 16, 1948, Universal filed a memorandum in opposition to the motion of Whitman to intervene, contending that there is no case or controversy within the court's jurisdiction; that intervention should not be permitted in the Circuit Court of Appeals, and that Whitman and its predecessor have been guilty of laches.

14. On February , 1948, a statement of ultimate facts relating to the proceedings and the charges of fraud in this case was filed by Assistants of the Attorney General in the name of the United States amicus curiae, and on March 8, 1948, Universal filed a reply in opposition thereto

and a motion to strike the same from the records of the court.

In the light of the facts above recited, it is ordered:

A. That Skelly's motion to withdraw from the cases as intervenor be granted upon the condition that the factual data assembled by it shall be made available to the court at any time during the course of the proceeding that the court deems it desirable.

B. That the United States through the Assistant Attorneys General designated by the Attorney General be authorized to participate in this proceeding as amicus curiae.

C. That the motion of Universal that the statements of the United States as amicus curiae be stricken from the records and the motion that these proceedings be dismissed be denied.

D. That the motion of Whitman to intervene be granted.

It is further ordered that in view of the report of the special master and the allegations of wrong-doing set forth by the United States as amicus curiae and by the William Whitman Company the court deems it necessary to determine whether J. Warren Davis, a member of this court, was improperly influenced in his action in these cases by the hope of gain or reward, and whether the judgment of this court in these cases was secured by fraud or wrong-doing

on the part of Universal Oil Products Company or any one acting in its behalf, and to that end sets forth the charges that have been made and are to be tried as follows:

(a) Whether Judge J. Warren Davis' action in these cases was influenced by the expectation of gain or favors pursuant to an agreement or understanding to that effect with Morgan S. Kaufman.

(b) Whether certain transactions effected in the latter part of 1935, whereby Morgan S. Kaufman advanced the sum of $10,000 to one Charles Stokley, a cousin of Judge Davis, were the means whereby Judge Davis was compensated in whole or in part for his decision favorable to Universal Oil Products Company in these cases, and whether certain other transactions between Judge Davis and Morgan S. Kaufman during the period 1935 to 1938 allegedly related to the litigation evolving from the bankruptcy of one William Fox, were part of a corrupt and illicit combination between Judge Davis and Kaufman to obstruct justice.

(c) Whether Morgan S. Kaufman was employed or retained by Universal Oil Products Company in connection with these cases and, if so, whether the purpose of such employment or retainer was the expectation of Universal Oil Products Company that Kaufman would exercise or endeavor to exercise an improper influence upon Judge Davis in order to secure favorable judicial action by him in connection with these cases.

It is further ordered that the motions and response filed herein by Universal be accepted as a general denial of all

allegations of wrong-doing above set out with leave to file an additional answer if it so desires on or before April 15, 1948.

And it is further ordered that in the trial of these charges the amicus curiae shall have the duty to present to the court the available evidence bearing upon the charges, whether or not it supports the charges, to the end that the truth may be ascertained; and that Whitman and Universal shall have full opportunity to present evidence bearing on the charges and to participate in the examination and cross-examination of witnesses and in the argument before the court, so that the customary procedure of an adversary proceeding may be observed.

And it is further ordered that the trial of the charges above set forth be consolidated with the trial of the charges set forth in the order of this court passed this day in Case No. 6459, American Safety Table Company v. Singer Sewing Machine Company, to the following extent, that is to say, the evidence in Cases Nos. 5648 and 5546, Root Refining Company v. Universal Oil Products Company shall first be taken and the privilege shall be accorded to Counsel for the respective parties in Number 6459 to cross examine the witnesses if they so desire, and that said testimony, when completed, shall be stipulated and accepted by counsel in Number 6459 as testimony to be considered in that case, and thereafter additional testimony may be taken in Number 6459, if counsel for either party or counsel for the United States, amicus curiae, so desire.

And it is further ordered that the costs of this proceeding shall be assessed at the conclusion of the trial against

the parties participating therein or any of them as the court may determine.

It is further ordered that the case be set for the hearing of testimony before the court at Philadelphia on May 10, 1948, and thence continuously from day to day until completed. Daily copy and daily topical index of testimony are to be furnished by counsel.

MORRIS A. SOPER,
United States Circuit Judge.

JOHN C. MAHONEY,
United States Circuit Judge.

E. BARRETT PRETTYMAN,
Associate Justice, United States Court of Appeals of the District of Columbia.

APPENDIX

Judgment dated July 6, 1948

United States Circuit Court of Appeals

THIRD CIRCUIT

Nos. 5648 and 5546

ROOT REFINING COMPANY,
Defendant-Appellant,

versus

UNIVERSAL OIL PRODUCTS COMPANY,
Plaintiff-Appellee.

Upon the findings of fact and conclusions of law set out in the opinion of this court this day filed in these cases, it is ordered, adjudged and decreed by the United States Circuit Court of Appeals for the Third Judicial Circuit this 6th day of July, 1948:

That the mandate of this court issued in these cases on October 30, 1935, be recalled, and that the order of this court of June 26, 1935, affirming the decree of the District Court be vacated, and that the cases be and they are hereby remanded to the District Court with directions to vacate its judgments herein and dismiss the bills of complaint.

It is further ordered that the costs of this proceeding, including the costs incurred in these cases and also in

Appendix

No. 6459, American Safety Table Company versus Singer Sewing Machine Company, consolidated for trial with these cases by the order of this court of April 6, 1948, be paid, four-fifths by Universal Oil Products Company and one-fifth by the American Safety Table Company.

/s/ MORRIS A. SOPER
United States Circuit Judge

/s/ JOHN C. MAHONEY
United States Circuit Judge

/s/ E. BARRETT PRETTYMAN
Associate Justice of the Court of Appeals of the District of Columbia

APPENDIX

Order dated October 27, 1948

United States Court of Appeals

THIRD CIRCUIT

IN RE

Nos. 5648 and 5546

ROOT REFINING COMPANY

v.

UNIVERSAL OIL PRODUCTS COMPANY

No. 6459

AMERICAN SAFETY TABLE COMPANY

v.

SINGER SEWING MACHINE COMPANY.

ORDER OF COURT UPON APPLICATIONS OF THE PARTIES FOR THE ALLOWANCE OF COSTS AND COUNSEL FEES.

Applications have been made to the court for the allowance of costs and counsel fees by the Attorney General, as the Attorney for the United States as amicus curiae, the William Whitman Company and Singer Sewing Machine Company.

Appendix

On July 23, 1948, Singer presented to the court a memorandum of an application for the allowance of costs and counsel fees and expenses in American Safety Table Company v. Singer Sewing Machine Company. On or about July 26, 1948, the United States made a similar application in both cases.

William Whitman Company formerly asked for counsel fees in its original application for intervention in Root Refining Company v. Universal Oil Products Company, and argued the same prior to the decree of this special court striking out the judgment therein. On July 31, 1948, Whitman expressed to the court its intention to press its application in respect to costs and counsel fees. Subsequently, on September 8, 1948, Whitman presented a bill for costs in this proceeding but did not present to this court a bill for counsel fees, reserving the right to assert and recover counsel fees in its suit against Universal Oil Products Company for the return of royalties in the District Court of Delaware; and at the hearing herein on October 25, 1948, Whitman presented no claim for counsel fees but made the same reservation.

At said hearing, the attorney for the United States expressed some doubt as to the propriety of allowing counsel fees to the United States and submitted the matter to the discretion of the court. At said hearing Singer pressed its application for counsel fees and costs as originally presented.

The decision in Sprague v. Ticonic, 307 U. S. 161, and Universal Oil Products Company v. Root Refining Co., 328 U. S. 575, establish the principle that in the exercise of their equitable jurisdiction the Federal courts may in their discretion allow not only what are known as costs between

party and party, but also costs as between solicitor and client. In the pending cases, however, we think the allowance to the successful parties should be confined to costs between party and party, and restricted to the items that will be set out below in this order. In rejecting the application for the payment of solicitor and client costs, we are influenced by the following considerations:

The proceeding before this court to vacate the judgment in Root Refining Company v. Universal Oil Products Company, while suggested originally by private parties, was undertaken and prosecuted as an investigation by the court itself into the integrity of its own judgment; and it would have proceeded to a final conclusion with or without the assistance or intervention of private parties. In fact, the original proceeding in Root Refining Company v. Universal Oil Products Company was brought to what was deemed to be a final conclusion and the judgment of the court was stricken out before the private parties now before the court, either in that case or in the case of American Safety Table Company v. Singer Sewing Machine Company, had appeared or asked to intervene. It was not until the order vacating the judgment in the first named case had been vacated* that Whitman intervened in the first named case and the Singer Sewing Machine Company filed a petition for the recall of the mandate and a reargument of the case of the American Safety Table Company; and while their efforts in the present proceeding have been helpful, they have not contributed greatly to the information already contained in the first record. In short, the case against the Universal Oil Products Company was made out before their entry, and they

*See Order dated October 29, 1948, p. xxii, *infra*.

have come in to reap the benefits of the disclosures, Whitman in order to advance its suit for a return of royalties which it has paid the Universal Oil Products Company, and Singer to secure a reversal of a decree in favor of the American Safety Table Company, both relying on the disclosures as to the relationship between Davis and Kaufman which had been made through the labors of their predecessors. It would be inappropriate, under these circumstances, to allow them payment for counsel fees which, under the decision in Universal Oil Products Company v. Root Refining Company, supra, was denied to those who first brought the incriminating evidence together. It should also be noted that Singer, although pressing its claim for counsel fees at this time, asked no more at the beginning of its entry in these proceedings than a recall of the mandate in the American Safety Table Company case, and a reargument of the case on its merits. Singer has gained far more through the insistence of this court on a complete investigation than it originally sought.

Furthermore, it is important to bear in mind that by the order of the present special court the prosecution of this proceeding and investigation was entrusted at the beginning to the Attorney General, as attorney for the United States as amicus curiae, and although the attorneys for the private parties have willingly cooperated, the burden of the case has been borne by the attorney of the United States.

Nor do we think that fees and expenses should be allowed to the legal representative of the Attorney General who appeared in this proceeding for the United States as amicus curiae. The matter did not concern merely private parties, but issues of great moment involving the integrity of the court itself were subjected to examination. It was

pointed out in Universal Oil Products Company v. Root Refining Company that a federal court can always call on law officers of the United States to serve as amici. Their appearance in the public interest in the proceeding at bar was singularly appropriate. Their assistance was invaluable and has been duly recognized in the opinion of the court, but in our judgment the contribution of the United States in counsel fees and legal expenses should be paid from the public treasury.

The William Whitman Company has requested the court to rule that the denial of its application for counsel fees and expenses be without prejudice to its right to claim said fees in its suit against Universal Oil Products Company in the District of Delaware. Singer has asked the court to rule that the denial of its application for counsel fees and expenses be without prejudice to any claim for said fees and expenses which it may present either in the proceedings that may follow the recall of the mandate in American Safety Table Company v. Singer Sewing Machine Company, or in any other proceeding.

In this situation, it is ordered that [*sic*] 27th days of October, 1948:

1. That the foregoing applications for counsel fees and expenses in these proceedings be denied.

2. That the request that said denial be without prejudice to subsequent claims of Whitman and Singer, as above set out, be also denied, it being the intention of the court finally to adjudicate the question of counsel fees and expenses incurred in this proceeding; but this ruling relates only to counsel fees and expenses of said parties in the proceeding before this specially designated court.

3. It is further ordered that the costs of the successful parties in this proceeding be allowed as follows:

(a) The cost of five copies of the stenographer's transcript of record, consisting of three copies furnished to the members of the court, one copy to the clerk of the court, and one copy for the use of the attorney who prepared the topical index.

(b) Witness fees.

(c) The costs of the original and one copy of the depositions filed in the proceedings.

(d) The costs of four photostatic copies of exhibits filed in the proceedings.

(e) The printing costs of petitions, briefs and statements of counsel filed with the court, not to exceed $2.50 a page.

4. It is further ordered that counsel present to the clerk of this court itemized statements of the costs in accordance with the foregoing provisions, and that the clerk of the court tax the costs accordingly.

5. It is further ordered that a copy of this order, if desired by any counsel, be included in the transcript of record to be filed in the Supreme Court in connection with the applications for writ of certiorari.

MORRIS A. SOPER,
United States Circuit Judge.

E. BARRETT PRETTYMAN,
Associate Justice, Court of Appeals of the District of Columbia.

APPENDIX

Order dated October 29, 1948

United States Court of Appeals

THIRD CIRCUIT

IN RE

Nos. 5648 and 5546

ROOT REFINING COMPANY

v.

UNIVERSAL OIL PRODUCTS COMPANY.

No. 6459

AMERICAN SAFETY TABLE COMPANY

v.

SINGER SEWING MACHINE COMPANY.

ORDERED this 29th day of October, 1948: That the order of this court filed herein on the 27th day of October, 1948, be amended by striking out the word "vacated" on the last line of page 2 [page xviii, line 22], and substituting therefor the word "filed".

MORRIS A. SOPER,
United States Circuit Judge.

E. BARRETT PRETTYMAN,
Associate Justice, United States Court of Appeals, District of Columbia.

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